

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
NPCR, Inc. d/b/a Nextel Partners)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the states of Alabama, Florida, Georgia,)	
Pennsylvania, Tennessee, and Virginia)	
)	
Nextel Partners of Upstate New York, Inc.)	
d/b/a Nextel Partners)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the state of New York)	
)	
To: The Commission)	

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The Rural Local Exchange Carriers (Rural LECs)¹ hereby respond to the Opposition to Application for Review filed by NPCR, Inc. d/b/a Nextel Partners and Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners (collectively, Nextel Partners).² This Reply stresses three key points:

¹ The Rural LECs include TDS Telecommunications Corp. (TDS Telecom); Ardmore Telephone Company; Castleberry Telephone Company, Inc.; Frontier Communications of the South, LLC; Frontier Communications of Alabama, LLC; Frontier Communications of Lamar County, LLC; Graceba Total Communications, Inc.; GTC, Inc.; Gulf Telephone Company; Interstate Telephone Company; Millry Telephone Company, Inc.; Mon-Cre Telephone Cooperative, Inc.; Moundville Telephone Company, Inc.; National Telephone Company, Inc.; New Hope Telephone Cooperative, Inc.; Ragland Telephone Company; Roanoke Telephone Company, Inc.; Union Springs Telephone Company, Inc.; and Valley Telephone Company, LLC.

² Nextel Partners' Opposition to Application for Review, CC Docket No. 96-45 (Oct. 12, 2004) (Opposition). The Opposition was filed in response to the Application for Review of the Rural Local Exchange Carriers, CC Docket No. 96-45 (Sept. 24, 2004) (AFR), which sought Commission review of Order, *Federal-State Joint Board on*

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First, the Rural LECs have never conceded that the grant of eligible telecommunications carrier (ETC) status to Nextel Partners is consistent with the public interest, even under *Virginia Cellular*. Although the AFR focused on the broader policy implications of the Bureau's ongoing review of pending ETC petitions, the Rural LECs continue to maintain that Nextel Partners failed to demonstrate that designating it as an ETC in the requested service areas is consistent with the public interest. This provides an independent basis on which the Commission should reverse the Nextel ETC Order.

Second, as the AFR argued and supporting commenters agreed, the public interest would be served if the Commission briefly suspended the Bureau's consideration of petitions for competitive ETC designation in rural service areas. The suspension would help to ensure that any changes to the ETC designation process adopted in the pending rulemaking proceeding are able to achieve their goal of improving the long-term sustainability of the Universal Service Fund.

Third, the Commission has ample authority to review and reverse the Bureau's decision.

I. DESIGNATING NEXTEL PARTNERS AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER IS INCONSISTENT WITH THE PUBLIC INTEREST

The Opposition suggests that the Rural LECs have accepted that the designation of Nextel Partners as an ETC is consistent with the public interest as defined in *Virginia Cellular*.³ Although the AFR did not highlight the deficiencies in the Bureau's application of *Virginia Cellular* to the Nextel ETC Petitions, the Rural LECs continue to believe that Nextel Partners does not meet the *Virginia Cellular* standard for ETC designation and that the Bureau's erroneous application of *Virginia Cellular* to the Nextel ETC Petitions provides an independent basis on which the Commission should reverse the Nextel ETC Order.

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Universal Service, NPCR, Inc. d/b/a Nextel Partners Petitions for Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, Pennsylvania, Tennessee, and Virginia, Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45, DA 04-2667 (rel. Aug. 25, 2004, amended by Erratum rel. Sept. 13, 2004) (Nextel ETC Order). Because the Opposition was served on the Rural LECs by mail, the due date for responding is extended by three days, excluding holidays, to October 27, 2004. 47 C.F.R. §§ 1.4(h), 1.115(d), (f).

³ Opposition at 3, 6-7.

Members of the Rural LECs brought to the Bureau's attention the fact that Nextel Partners' ETC petitions failed to satisfy the *Virginia Cellular* public interest test,⁴ and the AFR noted that the Rural LECs had serious concerns about the Bureau's application of *Virginia Cellular* to the Nextel Partners' ETC petitions.⁵ Although the AFR focused on the broader policy implications of the Bureau's ongoing review of pending ETC petitions, the Rural LECs continue to maintain that Nextel Partners failed to demonstrate that designating it as an ETC in the requested service areas is consistent with the statute or the public interest. Fundamentally, Nextel Partners has not established its capability (and, frankly, its commitment) to provide supported services throughout the designated service areas.⁶ State regulatory commissions have reached this same conclusion and denied petitions for ETC designation by Nextel Partners.⁷

⁴ See, e.g., Comments of TDS Telecom on Nextel Partners Alabama ETC Petition Supplement, CC Docket No. 96-45, at 7-9 (May 7, 2004) (TDS AL Comments); Reply Comments of the Alabama Rural LECs on Nextel Partners Alabama ETC Petition Supplement, CC Docket No. 96-45, at 5 (May 14, 2004). See also Comments of TDS Telecom on Nextel Partners Florida ETC Petition, CC Docket No. 96-45, at 8 n.22 (Feb. 22, 2004).

⁵ AFR at i, 2 n.1.

⁶ See, e.g., TDS AL Comments at 7-9 and nn. 20, 23. Nextel Partners' own coverage maps, available at <http://www.nextel.com/services/coverage/index.shtml> (last visited Oct. 25, 2004), show significant coverage gaps in the very rural service areas covered by the Nextel ETC Order. The company's buildout plans indicate no intention to expand coverage into these areas. See Updates to Nextel ETC Petition Supplements, CC Docket No. 96-45, Attachments (June 2, 2004) (providing updated Nextel Partners Construction Plans for Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia and showing most new construction in non-rural carrier territory). Where network coverage is lacking in significant portions of the designated service area, the Rural LECs do not believe that Nextel Partners' bland commitment to consider various steps to serve requesting customers outside its network coverage area is sufficient to meet the statutory requirement to provide supported services throughout the designated service area. The commitments apply only where a potential customer affirmatively requests service, but consumers who determine that the Nextel network does not serve their area are unlikely to make such a request. The coverage maps on the Nextel Partners website offer no information about the opportunity to request service in areas where the map shows that Nextel service is not available.

⁷ See, e.g., Order Denying Without Prejudice Nextel's Application for ETC Designation, Docket No. PT-6200/M-03-647, at 4 (MN PUC Dec. 1, 2003) ("Nextel has not adequately supported the assertion in its verified petition that it will meet all service obligations of an ETC. Nextel has acknowledged that there were large areas of its service area that it cannot serve at present. The Company presented no plan for expanding its service capabilities and simply stated that receipt of the universal service funding would change (in unspecified ways) the economic model that might (no guarantee or analysis to show reasonable likelihood) make expansion (of unspecified extent) into some (unspecified) areas possible."); Denial of Application No. C-2932, at 5-6 (NE PUC Feb. 10, 2004) ("NPCR has not
(continued...)")

II. THE PUBLIC INTEREST WOULD BE SERVED BY REVERSING THE VIRGINIA CELLULAR POLICY AND TEMPORARILY SUSPENDING CONSIDERATION OF PENDING PETITIONS FOR ETC DESIGNATION

The AFR acknowledges that the Commission's current policy under *Virginia Cellular* is to apply the standards established therein to pending petitions for ETC designation until new rules are issued. However, the AFR argues that changed circumstances justify overruling that policy for the brief period until new rules are issued. These changed circumstances include (1) substantial support for new ETC rules that will materially modify the *Virginia Cellular* standards, (2) establishment of a date certain for the issuance of new rules, and (3) evidence that continued application of the *Virginia Cellular* standard will have a substantial overall and long-lasting impact on the size of the Universal Service Fund.⁸ The Opposition does not effectively refute this argument. The need is great for the Commission temporarily to suspend processing of pending ETC petitions to ensure that the measures adopted in the pending rulemaking proceeding are able to accomplish their goal of improving the long-term sustainability of the Universal Service Fund.⁹

Moreover, there is no reason to believe that rural consumers would be harmed by a brief delay in giving universal service funding to wireless carriers (who may not even fully serve the designated area). On the other hand, the potential harm to rural consumers from continued

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provided sufficient evidence that it is willing and capable of meeting the core eligibility requirements of section 214(e). NPCR failed to provide sufficient evidence that it can provide the supported services . . . and failed to demonstrate to the Commission that it is willing to serve the entire designated area.”).

⁸ Because the Commission must issue rules within one year after issuance of a Recommended Decision by the Joint Board, 47 U.S.C. § 254(a)(2), *i.e.*, by February 27, 2005, that period will be only about four months. Thus, the Rural LECs are not proposing a “do-nothing-indefinitely” approach as Nextel Partners claims. Opposition at 10.

⁹ This position has been supported in comments filed on the AFR. See Supporting Comments of OPASTCO, CC Docket No. 96-45 (Oct. 12, 2004); Reply Comments of Verizon, CC Docket No. 96-45 (Oct. 12, 2004); Reply Comments of the United States Telecom Association, CC Docket No. 95-45 (Oct. 22, 2004); Supporting Comments of the Alaska Telephone Association, CC Docket No. 96-45 (Oct. 22, 2004).

unsustainable growth of the Universal Service Fund has been well-documented in the rulemaking proceedings.

III. THE COMMISSION MAY REVERSE EXISTING PRECEDENT PURSUANT TO AN APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO DESIGNATED AUTHORITY

The Opposition contends that there is “no legal basis” for the Commission to reverse the Nextel ETC Order because the Commission (and presumably those acting pursuant to Commission authority) are bound to apply existing rules until they are amended in accordance with the Administrative Procedures Act.¹⁰ This argument is based on an overly narrow view of the scope of the Commission’s authority to apply and alter its policies to serve the public interest.

Section 1.115(b)(2)(iii) of the Commission’s Rules allow the Commission to consider an application for review on the ground that “[t]he action [taken pursuant to designated authority] involves application of a precedent or policy which should be overturned or revised.”¹¹ The Commission is also free to decide at any point to freeze an ongoing practice to preserve the status quo while it considers modifying the policy underlying the practice.¹² Accordingly, the Commission has ample authority to consider and grant the request contained in the AFR.

¹⁰ Opposition at 6-7 and n.19.

¹¹ 47 C.F.R. § 1.115(b)(2)(iii).

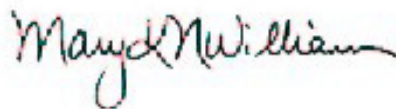
¹² For example, “in 1994, the Commission released a Further Notice of Proposed Rulemaking (Further Notice) that proposed a new licensing framework for Specialized Mobile Radio (SMR) systems in the 800 MHz band. After release of the Further Notice, there was a significant increase in the number of requests for General Category channels made by SMR applicants and licensees. On October 4, 1995, the Wireless Telecommunications Bureau temporarily suspended the filing of new applications for 800 MHz General Category channels, to ensure that resolution of the spectrum allocation issues raised in the Further Notice would not be compromised.” *See Order, City of Denton, Texas Request For Waiver to Permit Relocation Of 800 MHz General Category Station WNGC433, Denton, Texas*, FCC File No. A057457 (rel. Nov. 30, 2000). Courts traditionally have afforded regulatory agencies significant leeway in determining what procedures to employ to implement regulatory policy. *See, e.g., Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (citing *NLRB v. Bell Aerospace*, 416 U.S. 267, 291-95 (1974)).

CONCLUSION

For these reasons, the Rural LECs continue to urge the Commission to reverse the Nextel ETC Order and to direct the Bureau to suspend consideration of all pending petitions for ETC designation until after the issues raised in the rulemaking proceeding have been resolved.

Respectfully submitted,

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October 27, 2004

CERTIFICATE OF SERVICE

I, Mary Newcomer Williams, hereby certify that on this 27th day of October, 2004, I caused copies of the foregoing Reply to Opposition to Application for Review to be served by first-class mail, postage prepaid, on the following parties to this proceeding:

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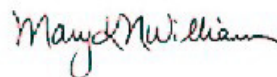
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